SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 92.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., Appellants,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. H. GADSDEN, ET ALS., Appellees.

REPLY BRIEF OF SOLICITORS FOR APPELLANTS.

WILLIAM H. LAMAR,
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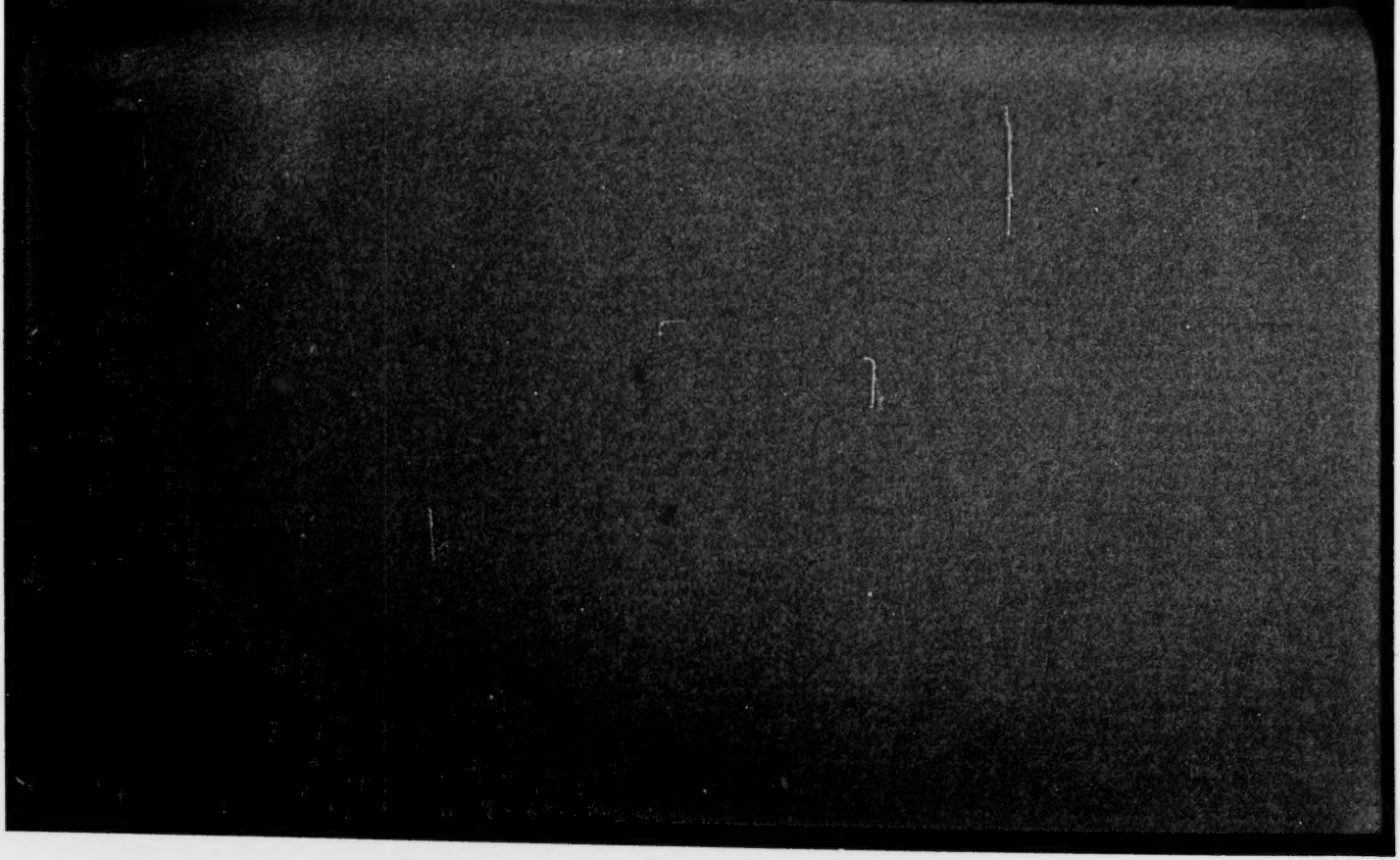

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET ALS., APPELLEES.

REPLY BRIEF OF SOLICITORS FOR APPELLANTS.

At the outset of our reply brief we decided to consider the contention of counsel for appellees that the case of the appellants is barred by laches or by the expressed terms of the statute of limitations of Florida.

I.

THE DOCTRINE OF LACHES.

This question has been considered in our opening brief, pages 160 to 170, and to the discussion therein the court is now referred.

As we understand it, it is an established principle, so elementary as to require no authority, that time is only one of the elements by which the court is guided in the application of the doctrine of laches, and that the rights of a claimant will not be held to be barred by laches unless, in the light of all the facts and circumstances of the particular case, such holding is most equitable and most nearly accomplishes the ends of justice.

In arriving at its conclusions upon this question, the court will consider the time which elapsed from the accrual of the right of action to the date when the suit was brought; but it will consider also the status of the property in question, the position of the complainants, and any facts which would tend to excuse a delay or to make it inequitable to apply the principle.

In this case it is contended that Mrs. Carew has conveyed this land to other parties, and that it would be inequitable to enforce the right of the claimants as against the grantees.

As a matter of fact, it is alleged in the bill that Mrs. Carew was herself, at the date of the institution of these proceedings, the owner of the greater part of the land in controversy, and that she had made certain conveyances. The first of these was to her brothers in the State of Georgia, made before the patent issued or the right of action accrued to the appellants, and we cannot avoid the inference from the facts and circumstances of that conveyance, as set out in the bill and the subsequent quitclaim by her brothers back to Mrs. Carew in 1900, that the real purpose of this conveyance was to place the legal title of this land in other parties residing in a different State, with the consequent embarrassments to appellants in pursuing their rights in the courts.

The other conveyances mentioned were principally to the attorneys for Mrs. Carew, who represented her in the Interior Department or subsequently; and it is expressly alleged in the bill, as to each of these conveyances, that they were made without any actual or real consideration, with full knowledge of the rights of the appellants and for the purpose of defeating the same, all of which allegations are admitted on demurrer.

If, however, it should develop in the further progress of this case, after evidence is taken, that any of these grantees are *bona fide* purchasers, or that they hold the land for value and without notice, or that they hold the land with equities greater than the complainants, then their rights cannot be disturbed, and the Hackley heirs, if originally entitled to recover, would merely have lost by the delay the lands now held by such grantees as do occupy this strong position. There is nothing in this record, however, to show that Mrs. Carew or any of the attorneys who have taken grants of this land have been in anywise injured by the delay of a few years. There is nothing to show that the value of this land has changed in any respect since 1896, that any improvements have been made thereon, that there has been any loss of evidence upon which the defense is based, or that the position of the defendants in making the defense has been in anywise prejudiced by the delay in bringing this suit; and it is respectfully submitted that, where none of these conditions appear, it will be difficult to find a case where the court has applied the doctrine of laches to defeat a claim resting upon a strong legal right and an equally strong equitable consideration.

In addition to these facts, it would have been little less

than folly for the appellants to have brought the suit against the patentees so long as proceedings were pending in the Department looking to the cancellation of these patents, and this question was not decided until about two years before the suit was brought. It might have been, if the proceedings had been instituted by the complainants, that when they secured a decree for the conveyance of the legal title by the appellees, that title would have been canceled in proceedings instituted by the United States; and, until the question as to whether such proceedings would be instituted was settled, it would have been at least unwise to begin the contest in the courts.

It is suggested, however, that if the Government had instituted proceedings to cancel these patents the appellants would not have been benefited thereby, and therefore it did not interfere with their bringing this suit. To the contrary, if these patents had been canceled all parties would have been thrown back into the Interior Department, and the appellants might have reasserted their claims there; or, if the lands had been patented to others, would have been in position to sue the new patentee. At least by the delay they saved the possible expense of a long litigation which might have resulted at the end in finding that the patents under which the legal title, which they sought to have conveyed, was held had been in the meantime canceled by the Government.

It is respectfully submitted, therefore, that the contention that the doctrine of laches is applicable to this case is without merit.

II.

Statute of Limitations.

Counsel for appellees incorrectly stated our position as to the statute of limitations. We do not contend that statutes of limitations are without application to any suits in equity in those jurisdictions where the equity and law jurisdiction is still separate. Our contention as to the application of the statute of limitations may be briefly stated as follows:

(*a.*) The statute of limitations first enacted in Great Britain applied to actions at law and had no reference to suits in equity. Subsequent to that enactment in England, the courts of equity, while denying that they were in any way bound or controlled by the statute of limitations, yet, for convenience, applied the doctrine of laches by analogy to the statute of limitations.

(*b.*) In the United States, in those States in which the distinction between law and equity has been abolished by the adoption of the civil codes, and the term "action" is used to embrace both actions at law and suits in equity, the statute of limitations is, by its terms, made applicable to both classes of actions, and is applied by the courts of such States, both in equitable and legal proceedings, in obedience to the terms of the statute. Such are the rules in Minnesota, California, and other States from which cases were cited by counsel for appellees.

(*c.*) In the States of the Union where the distinction between the equity jurisdiction and the law jurisdiction is still

maintained, the statute of limitations applying to actions at law is not held to embrace suits in equity unless made applicable thereto by its expressed terms.

In cases, however, in which the jurisdiction at law and equity is concurrent, the courts of equity apply the statute of limitations in the States, either in obedience to the statute or by analogy thereto, and thus prevent a party who has a right of action at law, and has permitted the same to be barred by the statute, securing relief upon the claim in the concurrent jurisdiction in equity.

In these States, however, where the equity jurisdiction is exclusive or the relief sought can only be obtained in equity, the statute of limitations is not applicable; but the courts of equity apply the doctrine of laches by analogy to the statute of limitations for convenience, unless there are peculiar facts and circumstances which would make it inequitable so to do.

Such is the rule in the State of Florida, in Virginia, New Jersey, and other States where the distinction between law and equity is still maintained.

(*d.*) In the United States court there are three rules:

(1.) Where the suit in equity in the United States court is one of which the law court would have concurrent jurisdiction, the law side of the court being bound by the statute of limitations of the State in which it arises, the equity side of the court will apply the same period of limitations, either in obedience or by analogy to the statute.

(2.) Where the suit is one of exclusive equity jurisdiction, and of which the State courts and the Federal courts have

concurrent jurisdiction—that is, which arises either under the common law or State statutes, and the Federal court has jurisdiction on the ground of diverse citizenship, for instance—the Federal court will adopt the rule of the State court of equity and applies the same period of the statute of limitations solely by analogy to the statute, unless there be some equitable consideration which would make it improper to apply the statutory period. Here the Federal court occupies substantially the same position as a State court of equity in those States where the distinction between the courts of equity and courts of law is still maintained.

(3.) In suits of a purely equitable character in the courts of the United States for relief upon purely Federal grounds or based upon acts of Congress the Federal courts are in no way affected by the statute of limitations of the several States. Their jurisdiction cannot be limited, restrained, or interfered with in such cases by State legislatures. They are bound solely by acts of Congress, the equity rules established by the courts, and, where these do not apply, by the rules of procedure and principles established by the High Court of Chancery of Great Britian. In such cases they may apply the analogy of the statute if they see fit, and often do so, as in the case of Elmendorf *vs.* Taylor, 10 Wheaton, 152, cited in the opening brief; but they are not bound by the statute nor bound to consider it, since they administer in such cases a jurisdiction entirely independent of State statutes, which is the same throughout the United States, irrespective of the varying periods of limitations fixed by the several States. The authorities illustrating these princi-

ples, which we have sought to summarize, will be found cited in our opening brief, pages 160 to 177. We do not, therefore, consider the further discussion of the principles as to the statute of limitations necessary.

Statute of Limitations of Florida.

In considering the statute of limitations of Florida we must follow the rule of construction applicable to all other statutes and look to the history of the law and the facts and circumstances surrounding both the enactment of the statute and the cases decided in the construction thereof, as well as the language of the statute itself.

An examination of the laws of Florida will disclose the fact that there was no statute of limitations in that State subsequent to the civil war until 1872, the stay laws having been in force from immediately after the civil war until that date (Hart *vs.* Bostwick, decided in 1872, 14 Fla., 162).

In 1870 the code of procedure was adopted in Florida, by which all distinction between actions at law and suits in equity was abolished and all proceedings for relief in the courts were termed "civil actions." This condition of the law continued until January 1, 1874, when the code of procedure was repealed and the original distinction between law and equity procedure was re-established, and has so continued down to the present time. When the statute of limitations of 1872 was enacted, however, the code of procedure was in force, and the term "action" as used in the statute of limitations was construed to embrace certain classes of suits in equity, because under the code then in force the

distinction between actions and suits had been abolished. This is the explanation of the decision of Branch *vs.* Cole in 18 Florida; Brown *vs.* Brown in 17 Florida; Jordan *vs.* Sayre, 24 Fla., 1, and Hope *vs.* Johnson, 28 Fla., 55, relied upon by appellees.

In the first of these cases the court explains that the suit there brought to set aside dower was a proceeding which, under the civil code in force at the time that the statute was enacted, would have been an action by complaint under the terms of that code, and therefore, construing the statute of 1872 in the light of the then existing state of the law, the term "action" as used in the statute must have been intended to apply to such a procedure. To the same effect is the decision of Brown *vs.* Brown. These cases were decided upon their peculiar facts and cannot properly be considered as authority for the contention of the appellees that the section relied upon applied to "any suit in equity."

In this connection it may be remarked that the quotation found on page 4 of the brief filed by Messrs. Gunby and Bisbee and page 2 of the brief of Mr. Bisbee, appearing to be from the decision in Brown *vs.* Brown, is not to be found in the report of that case.

Jordan *vs.* Sayre (*supra*), like Brown *vs.* Brown, arose when the statute of 1872 was in force, and the court applied the twenty-year limitation to a contract under seal in the foreclosure of a mortgage.

The same is true of Hope *vs.* Johnson (*supra*) except that the mortgage was a chattel mortgage not under seal, as to which the court applied the five years' limit barring a contract not under seal.

In 1891 the legislature of Florida adopted a complete re-

vision of its general laws, which became effective in 1892, and the present statute of limitations was a part of the revised statutes then enacted.

The present statute varies in many important particulars from the statute of 1872, but what is most important in the consideration of this case is the that the statute of 1892, now in force, was enacted after the repeal of the code of procedure and at a time when the distinction between law and equity jurisdiction had been completely restored in Florida.

It must be presumed that the draftsman of the present statute was an accurate lawyer, and the term "action" in those States where the equity and law jurisdictions are separate and distinct is never construed to embrace a suit in equity.

A mere examination of the statute itself, in the light of these facts, shows that it was not intended to apply and does not apply to a suit in equity, and, so far as we know, it has never been construed by the courts of Florida as embracing such suits.

To the contrary, as we have already shown, in States like Florida, where the distinction between law and equity is maintained, the statute of limitations upon actions at law is never construed to apply to suits in equity unless it be made applicable by the expressed terms of the statute, and is only applied by analogy upon the principles which we have already stated at length.

It is respectfully submitted, therefore, that, in the light of these considerations and the history and terms of the statute itself, it cannot be successfully maintained that the term "action" as used in the statute in question has any application to suits in equity, or that the provision of the statute

fixing a limitation of four years upon actions not therein expressly provided for can have been intended to fix a limitation of four years upon suits in equity of every character and description. If the legislature of Florida intended anything of that kind, justice to the public and for other considerations demanded that it should have expressed the intention in the clearest terms.

In the specifications of demurrer as filed in the circuit court on behalf of appellees there was only one section of the statute of limitations of Florida on which the appellees then relied. They have, however, attempted to specify in argument and not by specifications of demurrer another clause in a different section of the statute of limitations of Florida which, we contend, has not been properly raised for consideration by this court on the record as presented.

But, even if properly presented, their contention that the suit is subject to the provision of the statute fixing three years as a period of limitation upon actions founded upon fraud is untenable, and it would seem that the provision of the statute is itself a complete answer.

In the first place, this is not a suit founded upon fraud, either legal or actual, and it has been so held by this court in the case of Lee *vs.* Johnson, 116 United States, 48.

The jurisdiction of this court in cases of this character is based upon two grounds:

(1.) That the patentee has been guilty of such fraud as prevented the complainant from properly presenting his case to the Department or prevented the Department from properly considering his case when presented. These are the only conditions under which the claimant to land can invoke the jurisdiction of this court on the ground of fraud.

(2.) Where the jurisdiction of the court is invoked upon the ground that there has been an error in the construction of the law by the Interior Department, and in such case the constructive trusts (so called) sought to be raised is based entirely upon the claim of mistake in the construction of the law.

This case belongs to the second class. There is no allegation of any fraud which interfered with the presentation of the case to the Department or its consideration by the Department; but the sole ground upon which the jurisdiction of this court is invoked and the relief is asked is that the Interior Department had made an error or mistake in the construction of the law, and that but for this error or mistake the patent would have been issued to the complainants. This is not, therefore, an action for relief either upon the ground of legal or actual fraud.

It is suggested by counsel that unless this provision of the statute be held to apply to suits in equity it would nullify the provision, since relief on the ground of fraud is always sought in equity. This contention is manifestly unsound. There are numerous actions at law on the ground of fraud. An action for deceit is based upon this ground. A person induced to pay money by fraudulent representation may bring an action at law for its recovery upon the ground of fraud, and it has been held by the courts of Florida that an action of replevin for recovery of personal property obtained by fraud may be maintained in law (Hammond *vs.* Lynes, 21st Florida, 118). But why go further? Before this court in the case of Crawford *et al. vs.* John E. Burke, in the opinion delivered by Mr. Justice Brown on November 7, was

an action for damages on the ground of fraud in the conversion of personal property.

Looking also to the language of the section providing a limitation of three years, we find that the provision as to actions founded upon fraud is classed with actions of trespass and similar actions, and in the construction of this section the doctrine of *ejusdem generis* should be applied. It would be a most remarkable state of affairs if the legislature of Florida injected a limitation upon suits in equity in a section along with actions of trespass and other actions at law of a similar class.

Counsel for appellees call attention to the fact that there is no disability clause in favor of infants in the statute applicable to the four-year clause or the three year clause, and we submit that this is an additional reason for the construction given by us to the effect that both of said clauses are inapplicable to suits of the particular character involved herein, but relate rather to personal actions at law which could be instituted by administrators.

It is a rule for construction of statutes of this character that they must be taken as a whole. In this case, in article 2 of the statute, the legislature has provided a limitation of seven years for real actions, and actions of that class may be brought by heirs-at-law of a deceased person, as distinguished from the personal representative. In this section provision is made for the suspension of a statute during the period of disability by heirs-at-law on account of infancy, and it was obviously the intention of the legislature to provide for the protection of infants in all cases where they were the proper parties to institute the proceedings—that is, in all cases pertaining to real estate or involving the title

thereto. The case at bar involves a proceeding which could only be brought by the legal representatives of Hackley who are his heirs-at-law, and it is not only in accordance with the letter but the spirit of the law as well that, if the statute of limitations of Florida is to be considered at all in this case, that period should be applied which the legislature has fixed as applicable to actions at law involving the title to real estate.

In the light of these principles, it is respectfully submitted that the statute of limitations of Florida was not intended to embrace and does not embrace suits in equity; that this case being one of purely equitable jurisdiction, based upon an act of Congress, this court will disregard the statute of Florida in considering the question of laches in connection herewith; that if it considers the statute at all, it will follow the case of Elmendorf *vs.* Taylor, 10th Wheaton, and numerous other cases to the same effect and apply no shorter period than that fixed by the State statute as a limitation upon actions of ejectment, to which this proceeding is most analogous.

We will now notice briefly some of the authorities relied upon by counsel for the appellees. In the light of the principle stated, it will readily be seen that they have no application to this case, but are, without exception, decisions arising in States where a code of procedure is in force, the distinction between law and equity is abolished, or the statute of limitations by its terms includes proceedings in equity, or are cases in which there was concurrent jurisdiction in law and in equity.

These cases have been referred to more in detail in our original brief, with the one exception of Bank *vs.* Daniel, 12

Peters, 56, and the attention of the court is referred to our original brief, pages 174 to 177, inclusive, for more particular reference thereto.

In the case of Bank *vs.* Daniel, 12 Peters, 56, no federal question was involved. The courts of equity and law had concurrent jurisdiction, as expressly stated in the opinion.

In Baker *vs.* Cummings, 169 U. S., 189, there was no federal question involved. This was a suit for accounting, founded upon fraud in fact, of which law and equity had concurrent jurisdiction, and the statute of limitations as to a suit at law was applied direct.

In Norris *vs.* Haggin, 136 U. S., 386, there was no federal question involved. It arose in California, where the code of procedure was in force abolishing distinction between law and equity. The action was based upon fraud in fact, and the same was dismissed upon the ground of laches of fifteen years after discovery of the fraud. Special attention is called to a quotation from the decision of the court in this case, commencing at the bottom of page 174 of our original brief.

In St. Paul R. R. Co. *vs.* Sage, 49 Federal Rep., 315, the controversy arose under a State statute of Minnesota, where there is no distinction between law and equity. No federal question was involved. Besides this, the construction of the State statute was admittedly at variance with that given by the supreme court of the State in a prior decision.

Teal *vs.* Schroder, 158 U. S., 172, was a suit arising in California, in which the code of procedure is in force. The claim asserted did not arise under a federal statute, and fraud in fact was charged.

In Cleveland Insurance Company *vs.* Reid, 24 How., 284,

no federal question was involved and the State statute of limitations expressly provided for suits in equity.

It will thus be seen that the statute of limitations of Florida does not apply to suits in equity, and that, even if it did, it would not serve to bar a suit of the character involved herein. There is in this case a federal question; the suit is based exclusively upon the construction of statutes of the United States providing for the disposition of lands of the United States, and the court would only apply the statute of limitations of Florida, if at all, by analogy to suits at law for the recovery of real property, which is seven years.

III.

As to Vested Rights under the Act of April 22, 1826.

It is earnestly insisted by counsel that Hackley and his legal representatives could acquire no vested right under the act of 1826 until he had complied with all the conditions subsequent contained in the second section of the act of 1813, and had paid the purchase-money for the land.

Realizing that the authorities applicable to the early preemption acts, without exception, support our contention, and that not one authority can be found construing any preemption act prior to 1841 which is in conflict with our position, counsel earnestly insist that the act of 1826 was similar in principle, and practically the same in terms, as the act of 1841, and thus attempt to apply the authorities construing the act of 1841 in the construction of the act of 1826. In reply to this position, we ask the court to re-read our opening brief, pages 15 to 59, where this subject is fully discussed.

The terms of these acts themselves constitute a full answer to the contention of counsel. As pointed out in our opening brief, the act of 1826 is an immediate grant, as of the date of the passage of the act, of the right or interest thereby conferred in consideration of past settlement and cultivation.

The grant is made upon the same terms, conditions, etc., as are prescribed by the act of 1813. By turning to the first section of that act (see page 2 of opening brief) it will be found that the grant is made of the right to purchase upon the same terms as are provided by law for the sale of other lands sold at private sale in the territory in which the land may lie. The second section of this act prescribes conditions subsequent which must be complied with in order to *perfect the right of interest granted into a legal title.* It does not say that these things shall be done before the right or interest granted by the first section shall accrue, but requires that the person claiming the same shall, in order to perfect it into a legal title, give notice, etc., and provides that for failure to perform these conditions subsequent the right granted shall be forfeited. Why provide for a forfeiture if nothing had been granted? Why not provide that the claimant should *acquire* no right until these things had been done, if it were intended that they should be conditions precedent? The fact that the second section provides for a forfeiture for failure to give notice is conclusive evidence that an interest has been granted by the first section which can thus be forfeited. As was stated by the court in *Lytle vs. Arkansas,* when the settlement was thus "sanctioned by law" by the passage of the act, it became a legal right, subject only to be forfeited for failure to perform the conditions annexed to it—that is, conditions subsequent.

This construction of the acts of 1826 and 1813 is fully borne out by the historical development of the land system, the purpose and intent of these acts, the objects which they sought to accomplish, and the contemporaneous authorities construing the same, which have been reviewed in our opening brief, to which the attention of the court is earnestly asked.

In our opening brief, pages 21 to 28, we have pointed out the conditions which led to the passage of the act of 1841, and the difference between that act in terms and in principle to the act of 1826.

In their argument, counsel insist that the act of 1841 applied to past settlements, and therefore was similar in principle to the act of 1826 and other early pre-emption acts. This act did provide for all settlements made between the first day of June, 1840, and the date of the act, and, as to such settlements, gave rights similar to those conferred by the early pre-emption acts, *but not one authority construing the act of* 1841, *relied upon by counsel, deals with any settlement made between* 1840 *and the date of the passage of the act of* 1841.

The act of 1841 did what no earlier act had done, in that it provided for *future settlements.* In order that the future settler should acquire any right under the act, however, he was required—

(1.) To make settlement in person on public lands to which the Indian title had, at the time of such settlement, been extinguished;

(2.) Which public lands had been surveyed prior thereto;

(3.) He should inhabit and improve the same;

(4.) He should erect a dwelling thereon;

and then he should have the right of pre-emption "*upon paying* to the United States the minimum price of such land; subject, however, to the following limitations and exceptions."

Under this act, by its terms, all of the above steps had to be taken, including the payment of the money, before any right whatever was acquired.

A mere examination of the terms of this act shows that all the above provisions of the act are precedent to the acquisition by the settler of any right whatsoever, as distinguished from the early acts, which gave in terms the right or interest for the past consideration as of the date of the act, and then in another section provided for a forfeiture of this interest for failure to comply with certain simple conditions subsequent. This distinction is so clear that we are utterly unable to comprehend upon what principle or authority counsel contend for the contrary.

Counsel have cited, in their briefs and argument, a number of authorities which they claim support their position that the act of 1826 gave no right or interest in the land to the settler who came within its terms until he had complied with the conditions subsequent named in the second section of the act of 1813. We trust we can render the court some assistance by a brief review of the principal authorities so cited, and we think we can certainly show that they do not support any such contention.

Haile vs. Gaines, 22 Howard, 144:

This was one of the numerous cases growing out of the Hot Springs reservation, Arkansas. Haile claimed under a

pre-emption settlement, while Gaines claimed under a location of New Madrid scrip. The act giving the right to holders of New Madrid scrip to locate upon the public lands limited the same to lands "the sale of which was authorized by law." At the time that the alleged location was made the land in question had not been surveyed and was not open to entry. The court held that the location was invalid, as the sale of the land was not, at the time it was made, "authorized by law." It expressly refused to pass upon the pre-emption claim asserted in that case, since it had been denied by the court below. This case has no application to the case at bar, for the reason that New Madrid scrip could not be located until the lands were open for sale. It is not contended that the lands in Florida were open for entry or sale at the time Hackley made the settlement, but the act of 1826 granted to settlers upon the unsurveyed public lands the right of pre-emption, irrespective of whether the lands were at the time of settlement open for sale or not. The *act of Congress* must govern rights of parties in each case.

Rector vs. Ashley, 6 Wall., 142:

This was another case growing out of the Hot Springs reservation. It was another attempt to set up a title under New Madrid scrip, the location of the same having been made before there was any survey or before the land was open for sale. The court held that no vested interest in the land or any portion of it as against the United States was effected until after the survey was made and returned in the office of the recorder of land taxes, for the reason that until this was done the land was not open for public sale, *which was a condition*

contained in the act of 1815 providing for New Madrid scrip locations. What we have said with respect to the case of *Haile vs. Gaines, supra,* applies here. No such limitation was contained in the act of 1826, under which the complainants claim. Indeed, that act confirmed in terms the rights of every settler who had actually cultivated land in Florida, whether the same was at the time of settlement open for sale or not, and the rights of the complainants are governed and controlled by that act.

Frisbee vs. Whitney, 9 Wall., 187:

This was one of the numerous cases growing out of the Vellejo grant, and the pre-emption claim under consideration arose under the *act of* 1841. Frisbee was the original settler upon the tract of land in question, having acquired title under the Vellejo grant. That having been declared invalid in 1862, Whitney made a forcible entry upon the land occupied by Frisbee and erected improvements thereon and claimed the right of pre-emption. This occupation was resisted by Frisbee without success. In 1863 Congress passed an act for the relief of the settlers under the Vellejo grant, giving them the right to pre-empt their settlements under the act of 1841. Whitney claimed that, he having made his settlement prior to the passage of this act of 1863 for the benefit of Frisbee and others, Congress could not defeat the right acquired by such settlement under the act of 1841. The equities were all with Frisbee, as was stated by the court in its opinion, he being the original settler. The court below held that Whitney acquired a vested right by virtue of his settlement, which could not be defeated by the subsequent act of Congress. This decis-

ion was reversed by the Supreme Court in an opinion by Mr. Justice Miller, basing the reversal upon the terms of the act of September 4, 1841 (see p. 194). It was upon this state of facts (to which we invite the careful attention of the court, since great reliance is placed upon this case) that the Supreme Court held that under the act of 1841 the preemption claimant acquired no right, *as against the United States*, until he had complied with the provisions of the act and paid the money, and rendered its decision in favor of Frisbee, the original settler.

While the court held that the act of 1841 gave no vested right, *as against the United States*, until the conditions precedent had been performed, which was clear on the face of the act itself, it also held, in this case, that occupation and improvement does confer a *preference over others* in the purchase of such lands by a *bona fide* settler, which will enable him to protect his position against other individuals, and which the land officers are bound to respect.

While this case involved the construction of the act of 1841, and therefore cannot be used as authority against our position upon the act of 1826—entirely different in principle and in terms—yet the decision of the court that, even under the act of 1841, the first settler acquired rights which the courts would protect, is direct authority in support of our position.

Hutchings vs. Low, 15 Wall., 77 (Yosemite Valley case):

This case involves substantially the same principles as *Frisbee vs. Whitney*. On June 30, 1864, Congress granted the Yosemite valley to the State of California, in trust for-

ever, as a public park. Six weeks previous to the passage of this act Hutchings had entered the tract of land so granted, and made a settlement. He subsequently claimed, as against the State and the act of Congress aforesaid, the right of pre-emption under the act of 1841, by virtue of his settlement, made six weeks prior to the passage of the act. In support of this claim he urged that the act of 1841 gave to settlers a vested right, by virtue of their settlement, which Congress could not defeat by subsequent legislation.

The terms of the act of 1841 prescribing the conditions precedent were a sufficient answer to this contention, but it is obvious, from an examination of these opinions and the arguments thereon, that up to the time that cases arose under the act of 1841 settlement and occupation were regarded as giving a vested right of pre-emption under the former acts of 1826, 1830, and others which have been referred to; and it took several decisions to point out clearly the change which had been made in the law by the act of 1841, referring to future settlers.

The court held (see p. 87) that mere occupation and improvement, under the act of 1841, could give no right to the land occupied, as against the United States, nor impair the right of Congress to dispose of the same. The court italicized the words "as against the United States," thus showing that this principle was limited to claims against the Government, while settlement and occupation (as held in *Frisbee vs. Whitney*) would give priority of right which the courts would protect as against future settlers.

It is in this case that Mr. Justice Field reviews at length the case of *Lytle vs. Arkansas*, and points out that the decisions of *Frisbee vs. Whitney* and *Hutchings vs. Low*, upon

the act of 1841, are not in conflict with the case of *Lytle vs. Arkansas*, with which statement we are in full accord. He says, at page 92, "There is nothing in the case of the defendant which is at all analogous to that of Cloyes."

In both *Frisbee vs. Whitney* and *Hutchings vs. Low* the court refers in general terms to earlier cases, in which there were peculiar equitable considerations and difference in conditions and facts, which led the court to different conclusions, but which, in the decisions then being made, being upon entirely different statutes and different facts, the court did not deem it necessary to review.

Emphasizing the distinction between a claim against the United States and a claim between individuals, the court, at page 93, says:

> "The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all cases, whenever necessary for their decision, between the acquisition by the settler of a *legal right to the land* occupied by him, as against the owner, the United States, and the acquisition by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell."

It will thus be seen that in both *Frisbee vs. Whitney* and *Hutchings vs. Low* the court only decides that mere settlement and cultivation, under the act of 1841, could give no vested right as against the United States; but it also decides that, even under the act of 1841, where conditions precedent were prescribed, and had to be complied with in order to acquire a right as against the United States, yet mere settlement and cultivation would give a right as *against other claimants*, which the courts were bound to respect, and

which would be protected whenever the land was offered for sale by the United States. If that be true of an act referring to future settlers, where the right is given only upon the performance of conditions precedent, how much stronger is the position of claimants under an act giving an immediate grant to past settlers for a past consideration, subject only to forfeiture for failure to perform conditions subsequent.

Shepley vs. Cowan, 91 U. S., 330 :

This was another case which arose under the act of 1841, and therefore cannot be authority against our position on the act of 1826, yet there is much that is instructive in this decision.

Here the court again held that, "whilst according to previous decisions of this court, no vested right in public lands *as against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of the proceedings for the acquisition of the title, when the same are regularly followed up, are deemed to be the first in right" (Opinion, p. 338).

It was further held, under the act of 1841, that lands were not open for settlement until they were surveyed; but it must be remembered that the act of 1841, by express terms, limited its operations to surveyed lands, while earlier preemption acts contain no such limitation, and of necessity

applied to settlements on unsurveyed lands; otherwise they would have been inoperative. (See opening brief, pp. 70, 78.)

Rector vs. The United States, 92 U.S., 698 (Hot Springs cases):

In these cases there were three claims to be disposed of. The first was that of John C. Hale (Opinion, p. 702), which was a claim under the act of April 12, 1814, based upon an alleged settlement by one John Percifull, in 1809. At page 703 of the opinion the court holds that at the time of this alleged settlement no right could be acquired, because the Indian title to the land had not been extinguished, and that therefore the land was in reservation as Indian territory. It further holds, at page 705, that, aside from the legal obstacles, "it is not clear from the evidence that Percifull came within the description of the act of 1814. He resorted to the hot springs temporarily during the visiting season, to deal in such articles as persons there for their health needed. When they left, he left. If he erected shanties or cabins, it was not for the purpose of permanent residence, but for temporary accommodation. His actual residence was several miles distant. There is no clear evidence of an intent on his part at that time, or previously, to make this retired spot in the Indian Territory his home."

It will thus be seen that this claim was disposed of upon its peculiar facts, and did not necessitate a construction of the rights acquired by settlers who came within the terms of the act of 1814, and no construction of this act is given.

The Gaines claim was made under the act of 1830, which expired in 1831. In 1832, before any proof of this claim had been made, the lands were reserved by act of Congress.

Subsequently the act of 1830 was revived in 1834, but before it was revived the lands had been reserved. The court held, therefore, that at the time the lands were reserved for sale by act of Congress there was no existing claim on the part of Gaines, and no act in existence under which it could be initiated.

The third claim was that of Rector, who claimed under New Madrid scrip, which, as we have seen, was limited in its location to lands open for sale at the time the location was made; and the court held, in terms, that this land was not land "the sale of which was authorized by law" at the time of this alleged location.

All of these claims were disposed of upon their peculiar facts. They involved no construction of the statutes bearing upon this case, and are not authority either for or against our position.

Hall vs. Russell, 101 U. S., 503:

This case is relied upon by counsel in support of their positions (1) that the act of 1826 was not a grant *in præsenti;* (2) that no vested rights could be acquired by settlement and cultivation. The case does not support their contentions.

This was a case arising under the Oregon donation act of September 7, 1850. That act gave to every white settler or occupant of public lands, etc., "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act," the rights therein provided. Obviously, this four years' residence and compliance with the provisions of the act were conditions precedent to the vesting of any right. The act also related to future settlements, and there could be no

grant *in præsenti* to persons making settlements in the future, because the persons referred to in the act did not then exist.

Commenting upon this language, the court at page 510 says:

> "The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the legal title from the United States became vested."

The claimant in the case of *Hall vs. Russell* had not complied with these conditions, and therefore acquired no vested right.

This distinction is clearly shown by the case of *Johnson vs. United States*, 2 Court of Claims Reports, 391, reviewed in our opening brief (pp. 52, 53). In the Johnson case the settler had completed his four years' residence and cultivation; but his claim rested, as was stated by the court, "entirely upon his four years' continued residence and cultivation and previous notification." The court held that this gave him a vested right to the land, even as against the United States, and based its decision upon decisions under early preemption acts upon which we now rely, and particularly upon the case of *United States vs. Fitzgerald*, 15 Peters, 418, construing one of these acts.

Clearly, the case of *Hall vs. Russell* can have no bearing upon the case at bar, for the statute is entirely different in terms, and the facts of the case are also different. In this case Hackley had completed the settlement and cultivation required, just as in the Johnson case. Here the grant was to persons in existence in consideration of past settlement

and cultivation, which had been completed. Here all the conditions for a grant *in præsenti* existed, and the first section of the act of 1826, and also the first section of the act of 1813, clearly make such a grant to the parties coming within the terms of the description used in the acts.

The case of *Johnson vs. United States*, arising under the Oregon donation act, is a strong authority in support of our position, because there the right rested upon settlement and cultivation which had been completed, as in this case, and the court held that such completed settlement and cultivation gave a vested right, even against the United States.

Buxton vs. Travers, 130 U. S., 232:

This was a case which arose under the act of 1841. It is unnecessary to go into an elaborate review of the case. As we have already seen, under that act no right was acquired as against *the United States* until all the conditions precedent were performed. The act of 1826 contained no such requirement. In *Buxton vs. Travers* the conditions required by the act had not been performed.

This case is also cited as authority for the contention of counsel that, Hackley not being able to complete his right into a legal title before his death, nothing descended to his heirs. We have noticed this contention in our opening brief (pp. 110–123), to which the court is referred. A complete answer is found in the fact that the grant is made in terms to the settler or his *legal representatives*. But counsel, entirely disregarding the terms of the act, have sought to read into it provisions of the act of 1841, and to construe it by authorities applicable to that act, which can have no bearing upon the language of the act of 1826. Section 2269

of the Revised Statutes has absolutely no connection with this case.

This review of the authorities, cited and relied upon by counsel, shows clearly that these authorities are not opposed to our contention; but, to the contrary, in so far as they are applicable at all, the case of *Frisbee vs. Whitney* and other similar cases support our position, for they hold, in terms, that while under the act of 1841 no vested right was acquired against the United States until the conditions were performed and the money paid, yet, even under that act, as against *other claimants* to the land, mere settlement and cultivation gave to the first settler a right which the courts would protect when the land was disposed of.

On the other hand, our contention that the act of 1826 gave to the settler coming within its terms an immediate grant of an equitable interest in the land or a vested right to purchase the same upon the liberal terms prescribed therein for a past and executed consideration is not only sound in principle, but is supported by every authority which we have been able to find construing the early pre-emption acts.

These settlers went upon the public lands, though they were not for sale, made no claim thereto until Congress should act, but relied upon the universal custom then existing on the part of Congress to protect such settlers by enactments before the lands were thrown open for public sales. Congress did pass this act, giving to every settler upon the public lands in Florida the right of pre-emption in the purchase of the same as of the date of the passage of the act, and this grant was not a mere gift, but, as shown by the records of the Government from the earliest times, was

made in consideration of the benefits resulting to the public and to the property of the United States from the settlements thus made in the face of hardship and danger. The settlement and cultivation was a part payment for the land, and though the settler had no right to demand anything until Congress acted, yet when Congress did act and accepted this settlement and cultivation as part payment it vested in the settler a contingent equitable interest in the land as completely as if that part consideration had been paid in money or in any other valuable asset.

We have said that this position is sustained by every authority construing these early pre-emption acts. The principal authorities have been collected in our opening brief (pp. 38–59), to which the attention of the court is invited.

Thus the Secretary of the Treasury, in 1819, in construing the act of 1813, under which we claim (2 P. L. I. & O., 298), holds that locations of New Madrid scrip, under the act of 1815, will not be allowed where the right of pre-emption, under the act of 1813, *may have been or shall afterwards be proved.* In the same communication he holds that where lands have been sold at private sale, and under instructions from the Land Office, such sales shall be "considered as null and void, and the money refunded to the purchaser" if the right of pre-emption be proved to the land.

The Attorney General of the United States, in an opinion (2 P. L. I. & O., 61), holds that the act of 1830 gave an *unqualified right of entry* to persons who had possession as required by the act, and that it was *unlimited as to time,* except as to lands offered for sale under proclamation of the Presi-

dent, in which case it was limited to the beginning of sales. (See our opening brief, p. 44.)

As we have seen, the act of 1830 was limited to one year from the date of its passage. Any person was entitled to the land upon which he had settled who proved his right of pre-emption within one year. The Commissioner, in dealing with the difficulty growing out of private sales made within this year when the right of pre-emption might afterwards be proved, refers to the right of pre-emption as given by the act of 1830 as a "*vested right to a pre-emption*," although no proof had been made, and then says: "I would observe that many cases exist where lands have been sold at private sale, to which the right of pre-emption has since been proved, and will be sustained under the law." This decision could not have been rendered upon any other view than that the settler was given a vested right of pre-emption as of the date of the passage of the act, and it is, therefore, held that even if the land be sold before this right is *proved*, the settler's right will prevail, if proved by the time limited by the act.

We have seen that the supreme court of Arkansas, in the case of *Wynn vs. Morris*, 16 Ark., 414, held that the act of 1830 gave a vested right of pre-emption as of the date of the passage of the act, which right it protected, though the proof was not made until 1844. This opinion is quoted in our opening brief (pp. 46–50), to which the attention of the court is invited.

In the case of *Brown's Lessee vs. Clements*, 3 How., 666, the Supreme Court of the United States holds that the act of 1830 "*appropriated*" *to the claim of the settler* the quarter section upon which he had settled for one year (the act being

limited to one year), and that such appropriation could only be defeated by failure to comply with the conditions subsequent named in the act.

In *United States vs. Fitzgerald*, 15 Peters, 418–420, it was contended that the land claimed by Fitzgerald under an act of June 19, 1834, was reserved by the United States. The court says:

> "The reservation and appropriation mentioned in the act of 29th of May, 1830, must have been valid and subsisting *at the date of the act of 19th of June*, 1834, to deprive defendants of their right of pre-emption." (Italics ours.)

This is, in effect, to say that the right vested as of the 19th of June, 1834, the date of the passage of the act under consideration, and that any reservation to defeat that right must have been existing as of the date of the passage of the act, and not as of the date of proof of payment which was made to the 19th of June, 1834.

In *Lytle vs. Arkansas*, 9 How., 314, it is decided that the pre-emption claimant acquired a vested right by virtue of settlement and cultivation as of the date of the passage of the act.

Counsel have undertaken to explain away this decision, and have referred to the review thereof in *Hutchings vs. Low*, *supra*. In this latter case Mr. Justice Field was explaining that there was nothing in the case of *Lytle vs. Arkansas* to militate against his position in *Hutchings vs. Low* and *Frisbee vs. Whitney*, construing the act of 1841, and this is very clearly shown. That is all that the review of *Lytle vs. Arkansas* in that case amounts to.

The report shows that, in *Lytle vs. Arkansas*, Cloyes made

proof of his claim in May, 1831. The lands were not surveyed until December, 1833, and Cloyes then tendered the purchase-money. It is in this connection that the court, speaking of the pre-emption claim, says:

> "The claim of pre-emption is not that shadowy right which by some it is construed to be. Until sanctioned by law it has no existence, and is a substantive right. But when covered by law it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it."

This expression, "sanctioned by law," can only mean that when the act granting the pre-emption was passed, for if the court meant that it was "sanctioned by law" only when the conditions had been performed, then its subsequent language, saying that it could be defeated for failure to perform those conditions, is unintelligible. This is further shown as the meaning of the language of the court by reference to *Brown's Lessee vs. Clements*, 3 How., 666, above referred to, where the court used the expression that the act of 1830 was an appropriation of the land upon which the settler had made a settlement to his claim. It is further shown by the language of the opinion (p. 334), where it is said:

> "Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had *not only accrued* under the provisions of the act of 1830, but he had *proved his right under the law* to the satisfaction of the register and receiver of the land office."

This is, in effect, saying that the right accrued or vested as of the date of the passage of the act, and in this particular not only had the right accrued, but, in addition to that, Cloyes had *proved his claim*—that is, had performed

some of the conditions subsequent. If proof were necessary before the vesting of the act, this language would be meaningless.

It is submitted that no one can read this whole opinion without reaching the conclusion that the court there decided, in terms, that the pre-emption claim was "sanctioned by law" and vested as a legal right as of the date of the passage of the act.

If there were doubt upon this subject, it would be removed by the language of the same court in *Bernard vs. Ashley*, 18 How., 43–45, where, in commenting upon the case of *Lytle vs. Arkansas*, the court said that the land was decreed to "Cloyes, the claimant, this court holding his claim to the land to have been a legal right *by virtue of the occupancy and cultivation*, subject to be defeated only by failure to perform the conditions of making proof and tendering the purchase-money." (Italics ours.)

Here we have a construction of the opinion by the court which delivered it, and they say, in terms, that the right vested upon the passage of the act *by virtue of mere settlement and cultivation*, and that the conditions of making proof and payment were conditions subsequent, a failure to perform which conditions might result in a forfeiture.

This position is fully supported by the constructions of these early decisions in the case of *Johnson vs. United States*, 2 Court of Claims Reports, 391, where they were applied to the Oregon Donation act, as above indicated, and the decision in this case was so clearly right that, although a large amount of money was involved which the United States had to pay, it was not appealed to the Supreme Court. In that case, as in the cases arising under the early pre-emption acts,

the right rested entirely upon settlement and cultivation and the terms of the act.

It is submitted, therefore, that taking the terms of the act of 1826 and 1813 in the light of the principles governing the vesting of rights and interests in property, the rules in respect to conditions precedent and conditions subsequent, and the contemporaneous construction of these acts in the executive and judicial departments in all cases arising prior to the act of 1841, it is conclusively established—if anything can be established by principle and authority—that the act of 1826 was a grant *in præsenti* of a vested right or an equitable interest for a valuable past and executed consideration, and that this right or interest could only be defeated by forfeiture for failure to perform conditions subsequent annexed to it.

By the review of the authorities cited by counsel for the appellees it is seen that they have not produced one single authority in opposition to this view, and after an examination of the records and decisions upon land laws, from the earliest time down to the present, we have been unable to find a single authority that upon a careful examination in any way militates against our position. Nothing save long lapse of time and the introduction of new principles by modern legislation and modern decisions, construing recent legislation, could have caused any confusion upon this subject. We ask that these be brushed aside, and that the rights of the claimants be tested by the act under which they claim and the principles and authorities applicable thereto.

But we go further and say that, while the decisions relied upon by counsel, such as *Frisbee vs. Whitney*, *Hutchings vs. Low*, and *Shepley vs. Cowan*, establish that under the act of 1841 no vested right could be acquired *against the Government* until the performance of the conditions prescribed therein, yet, as between the Hackley heirs and subsequent claimants, where the Government has no interest, these cases are strong authority in favor of the claim of the Hackley heirs, founded upon prior settlement and cultivation; for they hold in terms that the prior settler acquired rights, even under the act of 1841, *by virtue of settlement and cultivation*, which the courts would protect against claims founded upon later settlements.

IV.

The Act of March 31, 1807.

Mr. Hampton, in his brief, has devoted much space to the argument that the act of 1807 nullified the act of 1826, with respect to the Hackley claim.

The fact that the Secretaries of the Interior reached this conclusion is, in our judgment, conclusive evidence of the very superficial investigation given to the case by the Department, and of the illogical character of their opinions.

We have carefully examined this contention in our opening brief, pages 60 to 69, to which we refer the court. It is sufficient to say here that, as we have shown, we think, conclusively, and as will more fully appear by reference to the debates upon this act printed in our opening brief, pages 183 to 205, it was the consistent policy of Congress, before opening such lands to sale, to pass acts confirming the rights

of settlers ahead of surveys. By the act of 1826 Congress, with the act of 1807 before it, declared that *every settler* upon the public lands of Florida should be entitled to the rights granted by that act, and the declaration of Congress to that effect is conclusive upon the courts, nor can the courts read other limitations or restrictions into the act. Whether the act of 1807 was in effect or not, the act of 1826 removed any disabilities which might have resulted therefrom with respect to settlers upon the public lands in the Territory of Florida.

V.

Did the Act of 1826 Apply to Settlements upon Unsurveyed Lands?

We have already discussed this question in our opening brief, pages 70 to 80, and have shown that this act and other early pre-emption acts applied peculiarly to settlements made ahead of surveys; otherwise they were practically of no effect. It was to protect such settlements that these acts were passed. This fact is recognized in all contemporaneous authorities, many of which are cited in our brief.

For instance, in the case of *Lytle vs. Arkansas proof of settlement* was allowed to be made two years before the surveys of the land in question had been made, and the court in that case (page 332 of the opinion) refers to the general instructions of the Land Office allowing proof to be made, identifying the land as well as the circumstances will permit, before surveys are made, and the court there holds that, proof having been made before survey, it is not necessary to make another proof describing the lands by quarter-section lines after the surveys have been made.

The act of 1813 refers to lines *run or to be run*, and the records of the Government are full of instructions similar to those referred to in the opinion in *Lytle vs. Arkansas*, allowing proof to be made where the surveys were delayed. Some of these are cited in our opening brief. We do not feel that a further discussion of this subject can be necessary or profitable. We will only add to what was said in our opening brief the following statement from the opinion of Mr. Justice Field in *Morrow vs. Whitney*, 95 U. S., 551, 554:

> "From the earliest period in the history of the country, claims to tracts of land upon which persons have settled and made improvements in advance of public surveys and before the lands have been offered for sale, sometimes upon the express invitation of the public authorities and sometimes upon their supposed acquiescence, have been presented for the equitable consideration of the Government."

We have already shown that Congress met these claims based upon settlements made ahead of surveys by special enactments, such as that under which complainants claim.

VI.

The Effect of the Occupation of the Tract in Question by Troops of the United States from 1824 to 1830, and the Subsequent Reservation.

Our contention that the act of 1826 gave to settlers in the Territory of Florida who came within its terms a vested right of pre-emption or equitable interest in the land as of the date of the passage of the act having been established, the only remaining question of consequence in this case, ac-

cording to our judgment, is the effect of the occupation of this tract of land by the detachment of troops from 1824 to 1830.

We have discussed this question fully, and cited authorities in support of our position, in our opening brief (pp. 81–118), to which we ask the special attention of the court.

In that discussion we think we have conclusively shown that such occupation did not constitute a claim to the land on the part of any other person, which was the only exception contained in the act of 1826. Indeed, this contention is so absolutely untenable that, although it was the basis of the decision of the court below, counsel have practically disregarded it in their argument.

We will now notice, briefly, their contention that such occupation constituted a reservation or appropriation of this tract of land, so as to take it from the operation of the general act of Congress.

In our opening brief (pp. 85–91) we set out fully the actual facts with respect to this occupation.

By reference to the record (p. 6) it will be found that the bill alleges that in the year 1824 "a detachment of United States troops sent to the southern portion of the Territory of Florida, under the command of Col. George M. Brooke, in connection with certain Indian troubles then existing, located a camp or cantonment upon said tract of land, which was then inhabited and cultivated by said Hackley," etc. It is further alleged that the land was reserved for the first time in 1830.

Secretary Smith in his opinion (p. 53) makes the following finding of facts as to Hackley's settlement and the occupation by troops:

"It appears that R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1823, and that said Hackley never relinquished his claim to said land, and that he made settlement in good faith, so far as the record discloses, and for the purpose of securing a home, which claim his heirs contend was superior to any made subsequent to the abandonment of such reservation.

"It further appears that in March, 1824, in obedience to the *instructions from the War Department*, that portion of said reservation now in controversy was *occupied by United States troops in cantonment*, and was so used until December, 1830, when it was *formally reserved by executive order*, in which its limits were fixed at sixteen miles square. Subsequent to this, said lands were in a state of reservation the greater portion of the time, until January 4, 1883, when they were relinquished and finally restored to the public domain." (Italics ours.)

This is the finding of fact in the opinion, which counsel contend is the only one which has any bearing upon this case. It is true that in the subsequent argument of the case the Secretary states that the tract of land was occupied under the direction of the Secretary of War, but this is stated by way of argument, while the finding of facts above quoted precedes the argument, and is the basis thereof.

The opinion is loosely written in many respects, and it is evident that in using the expression "occupied under direction of the Secretary of War" the Interior Department is basing its statement upon a supposed presumption that the action of the War Department is the action of the Secretary of War. To take any other view is to attribute to the Secretary a finding that is absolutely opposed to the entire record and the actual facts of this case, for the record shows that the land was actually occupied under an order issued by an aide-de-camp connected with

the office of the Commanding General of the Army, and that said order related only to the movement of troops and on its face was not intended to affect the status of this or any other tract of land. This may, in a general sense, be said to be the direction of the Secretary of War, for all orders emanating from any officer of the War Department within the scope of his authority is a direction of the Secretary of War. The finding of facts, however, which we have quoted above is the real finding of the Secretary in this case, and is to be taken as the facts of the case, so far as his finding goes, rather than the argumentative statement subsequently made.

It will further be noticed that the Secretary finds that this land was occupied by "troops in cantonment" and not as a reservation. A cantonment is a temporary camp for a detachment of troops in winter quarters or for other temporary occupation. This is the universal and accepted definition. It is but another name for camp.

The occupation was "in cantonment," not in reservation, nor is there any evidence of an *intention* to create any reservation or change the status of this land until 1830.

Now, what was the effect of such an occupation? If it be presumed that the direction of the War Department was constructively the direction of the Secretary of War, yet that does not constitute a reservation of public lands in any sense or change their legal status. The Constitution gives to Congress exclusive power to dispose of public lands. The courts have held that the President has the power by proclamation, in conformity with proper regulations, to make specific reservation of public lands for executive purposes, and have held, also, that where the order making such reservation is issued by the *head of an executive*

department it is presumed to be the order of the President and is effective; but we challenge the production of a case which holds that even were an order issued by a subordinate officer of the War Department for the purpose of creating a reservation such order would be effective to accomplish that result. The order must be actually or constructively the order of the President. To say that an order of the War Department, as distinguished from the Secretary acting for the President, is the order of the President would be to presume, first, that the order of the subordinate officer was the order of the Secretary of War, and then, upon that presumption, to presume that this constructive order of the Secretary of War was the order of the President, which would be basing a presumption upon a presumption, which is never allowed.

The authorities are absolutely opposed to any such position. In the case of *Wilcox vs. Jackson*, which is the only case which counsel cite in support of their contention, the court says that the order of the Secretary of War is presumed to be the order of the President; and, further, that when a tract of land is legally appropriated for any purpose—that is, set aside in accord with the provisions of the law and segregated from the public domain—it is not subject to a general act of Congress.

In *Wolsey vs. Chapman*, 101 U. S., 755, 769, the meaning of this language is considered. There the court says:

> "The truth is, there can be no reservation of public lands from sale, except by reason of some treaty, law or authorized act of the executive department of the Government, and the acts of *heads of departments* within the scope of their powers are in law the acts of the President." (Italics ours.)

In *United States vs. Tichnor*, 12 Fed. Rep., 415, and *Johnson vs. United States*, 2 Ct. of Claims, 391 (discussed in our opening brief, pp. 103 to 107), an effort was made by the commanding general to reserve the lands from public sale, with description of the land, and all the formalities observed, and yet the courts held that such action was not the action of the President, and that these orders were not effective to in any way change the legal status of the land. As was said in *United States vs. Tichnor:*

> "But such use or occupation would not have the effect to impart any special character to the land, or constitute it a reservation for any purpose within the purview of the donation act."

This statement is in accord with the unbroken line of decisions upon this subject, so far as we can find. It is suggested that because Colonel Brooke was sent to southern Florida with a detachment of troops to locate a site for a military cantonment, which, as shown by the allegations of the bill and the record, was to aid Colonel Gadsden in running the line in accordance with the Indian treaty, that this designation of Colonel Brooke and Colonel Gadsden to locate a site for the camp gave to their action some peculiar quality or force. It is submitted that there is nothing in this contention. If the Secretary of War or the War Department had directed Colonel Brooke to locate a contonment or fort or reservation in southern Florida, this in itself would not have made the location selected a reservation until it was approved by the President or the head of a department acting in his stead, for the Constitution has limited the power to dispose of public lands; and, as we have seen, it can only be done by Congress or by the President

acting personally or constructively. Colonel Brooke could have *selected* a site or a reservation and *reported his selection* to the War Department. Then if the Secretary had issued an order approving the selection and reserving the tract of land so selected, it would then, for the first time, have affected the legal status of the land. This is what was done in 1830, and up to that time the lands were as completely public lands as on the day they were transferred from Spain to the United States.

Wolsey vs. Chapman, 101 U. S., 755.

Morrow vs. Whitney, 95 U. S., 551.

Neither Colonel Brooke nor Colonel Gadsden were directed to locate any reservation, nor could this authority have been delegated to them. They were directed to locate a camp with respect to a certain object, and the permanent headquarters of the troops occupying this camp were declared to be at Cantonment Clinch. The Secretary of the Interior found nothing more as a fact in this case than that this tract of land was *occupied* by troops *in cantonment* from 1824 to 1830, and, as we have seen, the authorities hold that such occupation does not and cannot affect the legal status of the land. There is absolutely no record of any occupation or reservation or of anything else affecting the status of this tract of land in the Land Department until 1830, and we challenge the production of a case in which the legal status of land has been affected from the earliest history of this country to the present time when a record thereof has not been made in the Land Department, which has control of the public lands, or a case where their status has been affected otherwise than by act of Congress, a

treaty of the United States, or an order or proclamation of the President or one of the heads of departments acting in his name and by his authority, with intent to create a reservation and describing the land reserved by metes and bounds. Not one of the elements necessary to the making of a reservation existed in this case until 1830, even if such a power could have been delegated to a subordinate military officer, which we deny upon the most elementary principles of law and of agency. In *Morrow vs. Whitney*, 95 U. S., 551, the statute excepted lands "occupied" by the military. The distinction between "occupation" and reservation is there clearly shown. The first does not affect the status of land, and is shown by parol proof. The second affects the legal status, and is shown by record.

If this camp or cantonment had been abandoned in 1828 or 1829 or at any other time before the formal reservation in 1830, no question could have arisen as to the disposition of this tract of land. It would have been disposed of as Cantonment Clinch and as hundreds of other cantonments in the Territory of Florida were disposed of, which tracts were occupied by troops for a greater or less time, as the interests of the military service required, and when this occupation ended they were disposed of as all other public lands, their status never having been affected in the slightest.

It is submitted, therefore, that both reason and authority conclusively support the proposition that when the act of 1826 was passed, although Hackley could not *occupy* this land, for the reason that it was then in temporary occupation of troops, yet the legal status of the land, as public land, was the same as all other lands in Florida, and that the right of pre-emption in the purchase thereof, or a

contingent equitable interest therein in consideration of his settlement and cultivation, passed to Hackley and his legal representatives, by the terms of the act, as completely as if they had been named in the act itself. The only effect of this occupation was to deprive him of the right of possession so long as such occupation was necessary for the purposes of the United States, just as the United States can take possession temporarily of the lands of any citizen for its military purposes. The subsequent reservation in 1830 could not, as was held in *United States vs. Fitzgerald*, and is, as we understand, admitted, affect the right of Hackley (which had already accrued upon the passage of the act) further than to suspend the perfection of that right into a legal title until the land became subject to disposition and the reservation by the United States had terminated.

Against this position no sound reason can be advanced; not one authority has been produced. In support of our contention the language of the act itself can be cited; the reason of the law can be relied on, and an unbroken line of authorities has been produced as to the effect of occupation and the requirements as to reservation, and we ask that the rights of the complainants be adjudged accordingly.

We understood Mr. Bisbee to contend that the reservation of the land in 1830 destroyed Hackley's rights. The answer is that no reservation after Hackley's rights had accrued could affect those rights further than to delay the acquisition of the legal title and possession. The right remained unimpaired, subject to the superior right of occupation by the United States (Lytle *vs.* Arkansas, 9 How., 314; U. S. *vs.* Fitzgerald, 15 Peters, 418).

As to the contention that the act of 1856 defeats this claim,

we need only say that the act provided that abandoned military reservations should be disposed of as other public lands. When, therefore, these lands were restored to the public domain they came back in the exact condition they were when reserved, and with all rights attached. When the land was relinquished in 1883, it was restored to the status it occupied in 1830, except that notice of Hackley's claim was then on file and remained only to be perfected into legal title by payment of the purchase price which was tendered in 1887. It was restored subject to the act of 1826, as well as other acts of Congress.

VII.

The Contention that Hackley and His Legal Representatives Have Not Complied with the Condition Subsequent Named in the Second Section of the Act of 1813.

This question has been fully discussed in section 2 of part I of our opening brief (pp. 124–146), and, in view of the fact that we had but little opportunity in the oral argument to discuss this branch of the case, we ask especial consideration of the court to the argument in our brief, which we think is conclusive upon this point.

In this connection, however, we refer the court to the allegation of the bill (Record, p. 10), which is as follows:

> "Your complainants allege that they and their decedent, the said Robert J. Hackley, did make full compliance with all the requirements of the laws of the United States with respect to their right of preemption and purchase of said land; but that, disregarding the rights of your complainants," etc.

This allegation is admitted on demurrer, and would seem to be conclusive of this point.

In addition to this admission, however, by demurrer, it may be noted that Hackley did, in fact, comply with every provision of the law. That law required that he should give notice of his claim two weeks before the beginning of the public sales in the district in which the land might lie.

It was suggested by Mr. Gunby, in argument, that the sales had begun in the land district of Eastern Florida before notice was given by Hackley of his claim. A sufficient answer to this statement is that there is not one word in the record to support it, and it is opposed to the allegation above quoted, which is admitted by the demurrers. In addition to this fact, it need hardly be argued that the language of the act did not refer to the beginning of sales in the land district, but in the locality in which the land claimed was situated. To apply to the beginning of sales in the entire district, covering nearly the whole State, would be practically to defeat the purposes of the act, because such sales were begun when only a very small part of the land had been surveyed, and long before there was any necessity for giving notice, in order to protect purchasers at public or private sale from pre-emption claims, which was the sole purpose of this provision.

In addition to this fact, it is alleged in the bill (p. 8) that in 1835, as soon as communication could be had with the Land Office, Hackley gave notice of his claim to the register and receiver, and "claimed the right of pre-emption in the purchase" of this tract of land. In 1843, when no public sales had been made in this section, and the tract in question had not been surveyed, being then in reserva-

tion, Hackley again served notice that he claimed the right of pre-emption in the tract of land known as Cantonment Brooke, Bay of Tampa, under the act of 1826.

Now, as we have seen, the Department, by its instructions during this era, permitted proof of the claim to be made before surveys, describing the land as far as might be done, especially where there was danger of loss of evidence or for other reasons it was desirable that the claim should be proved. See communication by the Commissioner to the register and receiver at Palmyra, Missouri, September 21, 1824 (opening brief, page 132), where instructions are given that where there is apprehension of loss of testimony by death or otherwise, and applications are made to enter pre-emptions previous to surveying the lands, they will permit *the right of entry* to be established, and the *payment* and *entry* could be made *after the surveys were returned.*

See also *Lytle vs. Arkansas, supra*, where proof was made two years ahead of surveys, and the court held that it was not necessary to make such proof again after survey. Other authorities might be cited to the same effect, but these are sufficient; and under these instructions and regulations the notice given by Hackley in 1835, and again in 1843, was a full compliance with this requirement of the act. As stated in the instructions aforesaid, the money for the land could not be tendered until it was surveyed, because the amount had not been ascertained; but the proof was made and notice given to the world, in the record of the Land Office, that this land was claimed by Hackley and his legal representatives, whenever it was open for sale.

In 1883 the land was restored to the public domain, and a plat of this tract was filed for the first time; but it was not

offered for public sale, and no notice was given of public sales, as required by law. Ten days after the plat was filed it was suspended, and remained in suspension until 1894. In 1884 all entries made in 1883 were canceled by the Interior Department, and remained canceled until the final decision of Secretary Smith. In 1887, while the plat was still suspended, and the running of all limitations stopped thereby, Hackley filed a formal declaratory statement, making claim to the right of pre-emption of purchase of this land, and tendered the entire purchase price to the register and receiver, which was refused because the land was in reservation, under their construction of the law, by virtue of the suspension of the plat. (See Record, pp. 25 and 26.) Here was a third and strict compliance with every requirement and provision of the law.

But we insist that this question cannot be raised in this court. Not only is the allegation of the bill conclusive on demurrer, but by reference to the record it will be found that the claims to this land were, in 1889, referred to the register and receiver at Gainesville, Fla., to hear all parties, take proof, and report the various claims upon their merits. This was done. So far as the record discloses, no question was raised as to the compliance by Hackley with the conditions subsequent named in the act of 1813. The Commissioner of the General Land Office (Record, p. 34) says :

> "So far as the record is concerned, all these parties are on an equal footing, and as Hackley's rights antedated those of all other settlers, they are paramount before this office."

This decision was reviewed by two Secretaries of the Interior, elaborately discussed, and, so far as the record shows, no question was raised as to Hackley's compliance with the conditions subsequent named in the act; and very properly, because they would have been promptly met in the Interior Department by the statement that the Department, in the exercise of its powers, had referred this case to ascertain the rights of all claimants upon the merits, and, as stated by the Secretary of the Interior and by the Commissioner, as above quoted, they all stood on an equal footing on this question.

Not having raised this question in the Interior Department, where, if there was any defect, it could have been remedied, so long as the plat was suspended, the appellees cannot now raise it in this court. The effect of the decisions of the Department was to find that Hackley did comply with all the conditions of the act, and they only decided against him on propositions of law as to the initiation of the claim, upon which propositions we have undertaken to show that the Department was clearly in error.

Beginning, therefore, with the allegation of the bill, which is conclusive, and taking next the facts as disclosed by the record, which show a complete compliance with every provision of this law, and add to this fact that this question was not raised in the numerous hearings before the Department, and that these cases were referred by the Department to the register and receiver to take evidence upon the merits, all the cases stand on an equal footing as to these technical provisions; and we insist that, so far as this demurrer is concerned, it is conclusively established that Hackley and his representatives did comply with the provisions of this act, and in any event the question cannot now be raised.

Conclusion.

We have thus undertaken to notice the argument of counsel and the authorities cited with respect to some of the more important points involved in this case. If the case were considered alone upon the act of 1826, and upon the allegations of the bill and the facts as admitted by the demurrer, and upon the contemporaneous authorities construing the act of 1826, as it should be, there would be but little difficulty in its decision. It has been complicated by bringing in numerous irrelevant points, by the indiscriminate citation of authorities which have no application, and the difficulty arises out of eliminating this irrelevant matter. The case briefly stated is simply this:

Hackley made his settlement in 1823 and 1824. In 1826, four years before the land was reserved or its legal status changed in any way, Congress, which had exclusive jurisdiction in the premises, granted to every person and the legal representative of any person who had actually inhabited and cultivated a tract of land in the Territory of Florida (which description exactly covered the complainants), which tract was not rightfully claimed by any other person, the right of pre-emption in the purchase thereof, in consideration of the benefits resulting to the public, and the increase in the value of public property by virtue of such settlement and cultivation—an immediate grant for a past and executed consideration. It provided that such settler should perfect this right or interest into a legal title by giving notice of his claim and paying $1.25 per acre at any time before the beginning of public sales, of

which sales, under the law as it always stood, several months' notice was given by proclamation.

Hackley was deprived of the *occupation* of the tract of land in question by troops of the United States engaged in military service, but possession was not required by the act, and the legal status of the land was not affected until 1830, when it was included in a reservation for the first time. This reservation was made before Hackley could make proof of his claim under the conditions as they then existed, but his right had vested or accrued in 1826, and he did give notice and make proof, as required by the statute, in 1835, and again in 1843. With these notices among the records of the Land Office, the land was restored to the public domain in 1883. Ten days afterwards the plat was suspended and no more entries allowed, and entries already made were canceled in 1884. In 1887 Hackley again gave notice of his claim and tendered the entire purchase-money before public sales commenced, for they have never been made, nor has proclamation of any such sale ever been made. Upon these facts it is earnestly contended that there can be no reasonable question but that Hackley and his legal representatives come within the express terms of the act of 1826, and are entitled under the law to the land in question upon payment of the Government price, which right the court should protect. Whether we look to the authorities construing the early pre-emption acts or the act of 1841, this claim is superior to that resting upon any subsequent settler. The question as to whether it would be good against the United States is not raised, for the United States is no longer interested in the controversy.

This position is made stronger by the equitable consid-

erations growing out of surrounding facts and circumstances—considerations which have ever been invoked by the executive departments and the courts in support of the claims of these early settlers, who have been public benefactors in opening up the country to settlement and cultivation.

Especially is this true when his position and that of his legal representatives is contrasted with that of the patentee of this land. The purpose of the act of 1826 and of all these early pre-emption acts was to protect the claims and homes of pioneer settlers from speculators who followed in their steps and undertook to profit by their labors; yet if the decision of the Interior Department and the court below is allowed to prevail, the rights of the legal representatives of Hackley will be defeated by a claim notoriously speculative in its character and in its purpose—belonging to a class which every resource of the Government has been used to prevent and defeat.

Respectfully submitted.

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